United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No. 76-1373

76-1373

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

BENJAMIN GENTILE,

Appellant.

BRIEF FOR APPELLANT BENJAMIN GENTILE

Appeal From A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York

HOWARD L. JACOBS, P.C.
401 Broadway
New York, New York 10013
Attorney for Appellant
Benjamin Gentile

HOWARD L. JACOBS
DONALD E. NAWI
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 76-1373

BENJAMIN GENTILE, :

Appellant. :

----------X

BRIEF FOR APPELLANT BENJAMIN GENTILE

Benjamin Gentile appeals from his conviction of July 29, 1976, in the United States District Court for the Southern District of New York (Gagliardi, J.) upon a jury verdict of conspiracy and extortion. 18 U.S.C. Secs. 371, 891-92. His sentence was fifteen months (and two years probation) which, with stipulated credit for an earlier contempt sentence, made the confinement part eleven months. Counsel on this appeal is assigned under the C.J.A.

Frank Sacco and John Rhines, two co-defendants, were convicted also. Sacco's appeal pends jointly with this one. Change of Sacco's assigned counsel on two occasions accounted for most of the time between the conviction and the prosecution of the appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to sever Gentile's trial from that of Sacco. Sacco conducted his own defense. As counsel he made statements to the jury about Gentile about which he could not be cross-examined which raise questions on this appeal under the Sixth Amendment and Bruton v. United States, 391 U.S. 123 (1968).

2. Whether the district court erred in refusing to set aside Gentile's conviction because of the taint of an illegal wiretap notwithstanding compelling evidence, never met by the Government, that based on the tap agents had engaged in surveillance of Gentile about which they testified at trial.

STATEMENT OF FACTS

The Government's charge was that Sacco loan-sharked various sums to Sonny Robbins, and threatened violence to obtain re-payment, with Gentile and Rhines assisting in collection and enforcement. (A.12-14)* Robbins was the Government's principal witness. The crime, crediting him, occurred as follows:

Robbins ran an auto wrecking business in Peekskill, New York. In March, 1970, he borrowed $500 from Sacco. The loan was made at Dooley's Tavern in Peekskill where Sacco directed

---

* Numbered references, unless otherwise specified, are to the trial transcript. "A" denotes the Appendix to this Brief.

Kitty Fabian to write a check. (131, GX 2) The money went to pay Robbins' business rent. (256)

Sacco told Robbins he would have to pay $25 a week (134-35) and for about six months those payments were made, Robbins sometimes dropping the money off at Dooley's. (136) A few times Gentile came to his shop to pick up the money. (137)

Robbins had no understanding that there was violence related to the loan and no fears about this transaction because he expected to pay the money back (217, 242, 260), but it set the stage for another loan of $1,000 from Sacco to Robbins in June, 1970 (148,169), and on that one Robbins did believe something might happen if the loan was not repaid. (218)

Sacco told Robbins he would have to pay $75 a week from then on. (170) Gentile was present when the loan took place and picked up the payments for several months at Robbins' garage. (173)

For about a year thereafter Robbins made no payments* and did not hear from either Sacco or Gentile. In December, 1971, he met Sacco and Rhines at the Charcoal Pit -- a Peekskill restaurant. Sacco first said he owed him $9,000 (184), then said he would settle for $4,500, and ultimately $2,500 (187) with Robbins paying $125 a week until he could make payment in full. (187) One such payment was made to Rhines (192), and Rhines

---

* The Government argued that interest on the loans, figuring $25 and later $75 until payment was made in a lump sum, came to 260%.

made other collection efforts and (along with Sacco) threats. (201-03)

At about this time, the FBI contacted Robbins (204), found out his involvement with Sacco, and planted agents to observe and overhear at meetings involving Sacco, Robbins and others, all leading to the indictment in this case.

The Evidence Against Gentile

In addition to Gentile's presence during several of the Robbins-Sacco meetings and his collections, the Government's case against Gentile was basically this:

First were Gentile's talks with Robbins about possible violence. In one, Robbins said he didn't want anything to happen to his family, and Gentile replied: "Well, you don't have to worry about that. We'll tell you in advance if something like that is going to happen." (174) In another, Gentile said that "other boys" were supposed to see Robbins about his late payments, but "he [Gentile] had asked them to just give him one more chance to come up and see what my problem was". (178) Rhines also told Robbins that Gentile was "rough when he wants to be". (195)

Second was Gentile's telephone call with Barbara Robbins -- Robbins' wife -- at the end of 1971. Gentile told her that Robbins had a $9,000 obligation "to meet and that it would have to be taken care of". (512)

Third was the activity at Dooley's Bar in Peekskill, where Sacco made the first loan and where Robbins often made payments allegedly destined for Gentile. The Government showed that Sacco invested $7,000 in the bar through a loan to Kitty Fabian, its owner (370), and commissioned Gentile to spend much of his time there to watch the investment and see that there was no trouble. (372) In addition, two Agents testified to a visit to the bar in April, 1970, as part of undercover investigations of Sacco. (349) One, Agent Estler of the State Liquor Authority, saw Gentile at the door on April 24, overseeing policy on who could be admitted. (346) Another, Alcohol, Tobacco and Firearms Bureau Agent Goetz observed Gentile on April 26 receive cash register tape information from the bartender (350), and overheard Gentile say, "We have a piece of the place." (360)

Indictment; Trial; Sacco's Handling of His Own Defense

The Strike Force filed indictment 72 Cr. 332 in March, 1972. Count One (A.12) charged the first $500 loan against Sacco alone. This count was dismissed at trial because of Robbins' testimony that he was not in fear of violence when he took the loan. Count Two charged the $1,000 loan against Sacco and Gentile. Count Three (A.13) was the alleged conspiracy between Sacco, Gentile and Rhines, and Counts Four through Eight specific instances in 1970, 1971 and 1972, of alleged threats chargeable to all three because they occurred during the life of the conspiracy. (A.14)

Trial took place in September, 1972. Right before it started, Sacco told the court he could not get along with his assigned counsel, Abraham Solomon. Since the court refused to appoint another lawyer, Sacco represented himself, with Solomon sitting at the counsel table in case his advice was needed (Transcript, September 11, 1972). For reasons we shall canvass in Point I of the argument, it was immediately apparent that if Sacco acted as his own attorney, and among other things was given the opportunity to address the jury without cross-examination by Gentile's counsel, Gentile could not receive a fair trial. Gentile's motion for severance, however, then and at later junctures when the prophecy of prejudice came true, were all denied (e.g., A.63, 66).

Conviction; Taint Hearings

The jury convicted all defendants on each of the counts with which they were charged (except for dismissed Count One because there was no extortion connected to the original loan). In doing so, the jury rejected Sacco's defense that his payments to Robbins were not extortionate loans but legitimate investments as a partner in expanding the Robbins junkyard business. Sacco did not testify as such, but continually addressed the jury on the facts in his capacity as counsel. Gentile did not testify either. Rhines did.

For seven months in 1969 and 1970, however, the Westchester District Attorney had tapped Sacco's phone. (A.60) Sacco

insisted that the taps were illegal and that illegal evidence from them had found its way to the federal investigation. The district court started its own consideration of the taint issue, but then held it in abeyance because Sacco was making the same challenge to his other federal extortion convictions in Maryland and Florida and the courts there were holding extensive hearings which the district court saw no need to duplicate. Matters were further delayed while Sacco took a vacation from federal confinement.

The tap question was important for Gentile. Sonny Robbins' testimony was doubtful for conviction because in his discussions of threats with Gentile, the thrust was that someone else -- not Gentile -- might rough up Robbins and Gentile would do all he could to avoid it.* Barbara Robbins' testimony about the $9,000 which had "to be taken care of" was a problem, but by no means insurmountable because Gentile did not explicitly threaten violence if the debt was not taken care of.** The Government's buttressing of this proof, however, with the SLA and BTA testimony about Gentile as a partner in Sacco's Dooley operation, and actively running it, tied Gentile as first lieutenant in general to Sacco, and particularly to Dooley's where the first loan had been made, where Robbins had taken his payments (sup-

---

* This was demonstrated also by Robbins' statement to Rhines that "Benny Genti seems like a pretty nice guy." (195)

** The conversation was apparently a civil one. Barbara and Gentile "talked about the Robbins' business itself. He said it was a good business to be in." (512)

posedly to or for the collector Gentile), and where Robbins had attended meetings when threats were made about his late payments.

The district court held a hearing in March, 1976, on Gentile's claim that the illegal taps had tainted his conviction because evidence from the Westchester wiretap had found its way to the State Liquor Authority, which in turn had reached FBI Agent Walsh who handled the investigation in this case. Walsh testified, and the court had before it also transcripts of the Florida and Maryland hearings. In those hearings, former state policemen testified that they gave wiretap material to federal agents, without specifying whom.

The district court denied Gentile's taint motion. (A.60) It took the Government's concession for purposes of the motion that the Sacco wiretaps were illegal, and added a further assumption that Gentile had standing to challenge them. (A.61) It fully credited Walsh's testimony that he had obtained no information from the State authorities other than the SLA (A.61); it rejected the contrary testimony of the state officers on credibility grounds; and it held that if specific wiretap information came to Walsh through the SLA (although it found this was not shown), the Government had successfully obtained the same information previously from independent investigative sources. (A.62) It addressed only obliquely the hard issue on the motion -- how SLA Agent Estler and BTA Agent Goetz had come to be at Dooley's Bar in April, 1970 -- by holding that "no

evidence was presented to indicate that any information in the S.L.A. files came from the illegal wiretaps" (A.62).

ARGUMENT

POINT I

GENTILE SHOULD NOT HAVE BEEN TRIED WITH SACCO. SACCO, IN HIS ROLE OF COUNSEL, MADE PREJUDICIAL STATEMENTS TO THE JURY CONCERNING GENTILE ABOUT WHICH HE COULD NOT BE CROSS-EXAMINED.

We have argued severance before in this Court, F.R.Cr.P. 14, usually unsuccessfully, including in a case in which defendant's brother was a principal co-defendant and, as here, represented himself. United States v. Calabro, 467 F.2d 973, 987-88 (2d Cir. 1972); United States v. Di Giovanni, 544 F.2d 642 (2d Cir. 1976). There is a Sixth Amendment consideration here, however, arising from Sacco's statements to the jury while representing himself which, in our view, makes this one of those rare cases in which the district court must be reversed on severance grounds.

The point is that Sacco, in his guise as counsel, made repeated statements to the jury about Gentile. These statements prejudiced Gentile and, since Sacco did not testify, they could not be answered or diluted by cross-examination. For example, in his opening Sacco told the jury: "Mr. Gentile will testify in this trial that he acted on my instructions to collect monies

from Mr. Robbins which were due to me as per the understanding we had. He will further testify that he never threatened Mr. Robbins in any manner." (A.65) It was bad enough that Gentile had no intention to testify and in fact did not do so. (A.66-67) More than that, however, Sacco's statements were in effect testimony that Gentile in fact acted on Sacco's instructions, that Gentile in fact made collections from Robbins, and that Gentile in fact had conversations with Robbins which might be construed as threats.*

The same thing happened on summation. Sacco stated to the jury that, "Benny spoke to me" about the second loan. (A.69) He continued on the conspiracy charge (A.70-71): "I say to you there was no conspiracy in this case. Whatever Mr. Gentile did, he did at my request. What Mr. Rhines did, he did at my request. We didn't conspire to put fear into this guy . . . ." Sacco went on (A.71): "Nobody's denying that . . . we met with these people . . . . There were probably more meetings that are not even in here. Maybe there's 50 more times we met with him. There could be a hundred more times that we called him on the telephone. I can't recall every day."

If the Government had introduced similar statements of Sacco in the form of out-of-court declarations, there would have had to be a severance, Bruton v. United States, 391 U.S. 123 (1968), because Gentile could not cross-examine Sacco on them.

* These statements carried impact as testimony because Sacco had been a participant and spoke to the jury from knowledge rather than as a lawyer with second-hand information.

We see no difference in principle and in Sixth Amendment confrontation rights between this case and Bruton. By acting as his own counsel, Sacco became in fact a witness who could not be cross-examined. Gentile was entitled to a trial free from that.

The severance argument based on Bruton is re-enforced by other aspects of Sacco's dual role of defendant and lawyer. Sacco was described in one of the SLA memos as "reputedly a 'high official in the Westchester County Cosa Nostra'". The Government's evidence conveyed that to the jury. For example, as part of its case on the fear induced in Robbins, the Government showed that Sacco drove a Ford LTD with visible bullet holes (142); that he wanted Robbins to dispose of the car (147); that he was going to eliminate someone named Ruggiero if Robbins could first get money from him (176); that he knew there was "a contract out on this fellow, Anthony Iodice" (168-69); that he had a reputation as being "dangerous"; and that Robbins understood he would be in serious trouble and that something would happen to his family if he didn't meet his obligations (218-22).

It was thus difficult enough for Gentile to be tried with Sacco (A.64), but a fair trial really became impossible when Sacco undertook to conduct his own defense. Even if well intentioned, which the district court doubted (A.78-80, 90-91), Sacco made the proceedings a joke for Rhines and Gentile. His cross-examination of Robbins was highlighted by posing the names

of ten or so apparently shady characters with whom he was associated, and trying to draw from Robbins whether he had ever heard of them (225-31). On his cross-examination of Iodice, he insisted on bringing out what Robbins had said about the interest on the first loan over the explicit warning that he was opening the door (407-08, 416; A.74). He cross-examined Barbara Robbins at length about Gentile's statement that $9,000 had to be taken care of (524-25), and elicited details of her husband's dropping off payments at Dooley's, finishing for the Government what it started on direct. He drew from a surveillance agent who gave harmless testimony on direct, that he was investigating "violations against the United States Government" (624). He drew from another agent that he had to "provide protection for Sonny Robbins" (688-89), and from two others that Robbins was concerned about his own safety and that of his family (707, 870). He called Agent Walsh to the stand as part of his case and asked page after page of objectionable questions and other questions about Robbins' statements to Walsh implicating Gentile and Rhines (e.g., A.81-89). He called a Frank Squires to the stand, brought out his extensive criminal background, only to have Squires claim the Fifth Amendment when asked about another loan to Robbins (A.92-93).

These, and some other episodes we have collected in the Appendix, including constant clashes with counsel for Gentile and Rhines (A.95-99), are only samples. The transcript as a whole is replete with other instances of the same thing.

De Luna v. United States, 308 F.2d 140 (5th Cir. 1962) points up the case for severance in these circumstances. There, Gomez and De Luna were jointly tried for importing narcotics. Each protested his own innocence and blamed the other. Gomez testified, De Luna didn't. In summation Gomez' attorney dwelt extensively on De Luna's failure to testify, something the Government could not have done. The Court held that Gomez was permitted to draw inferences from De Luna's failure to testify; that De Luna was entitled to a trial free from such inferences, whether drawn by the Government or a co-defendant; and that the district court, therefore, should have severed the cases and tried each defendant separately.

This reasoning supports a similar result where, as here, the Government obtained Sacco's testimony against Gentile and other damaging material only because of the joint trial. See also United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973), (severance when one defendant attempted to place blame on other and was "the government's best witness" against the latter); United States v. Barrera, 386 F.2d 333, 339 (2d Cir. 1973), ("close case" for severance when one defendant's insanity defense takes point of view that other defendants had participated in the conspiracy charged).

POINT II

THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROVING THAT AN INDEPENDENT LEGITIMATE SOURCE LED TO THE DOOLEY INVESTIGATION.

The district court, we submit, erred as well in its handling of the taint issue.

It was clear enough that the Westchester District Attorney learned about Sacco's connections with Dooley's from the wiretap. William McKenna's affidavit of March 6, 1970, in support of a renewed wiretap order of that date stated:

> "Intercepted conversations have indicated that Frank Sacco has acquired an interest in a bar in Peekskill, a bar formerly known as Dooley's. He has spent a great deal of time in Peekskill preparing for the grand opening, scheduled for the night of March 6, 1970."*

At this time the State Liquor Authority began an investigation into Sacco's "availing" of Kitty Fabian's Dooley's license. An SLA memorandum of March 12, 1970, mentioned Sacco as "one of those suspected of involvement in the 'availing'", noted that he was a reputed loan-shark, and added that Kitty's husband had been in trouble with loan-sharks and had fled.

Louis Cherico, the Westchester District Attorney in charge of the Sacco wiretaps, testified in the Maryland hearings (p.1173) that someone in his office did in fact contact the

---

* Similar testimony was given in the Florida hearings, p.1444.

State Liquor Authority about Dooley's and Sacco's involvement there. And a later SLA memo of May 7, 1970, on Dooley's, referred to information received in another context "from a cooperating enforcement agency", undoubtedly the Westchester D.A.*

The inference is overwhelming that the Sacco wiretaps started the SLA on its Dooley's investigation, leading in turn to the Estler and Goetz observations about which they testified at trial. Overwhelming or not, the Government was required to demonstrate that there was an independent source for the Estler and Goetz investigation, rather than the wiretaps. Alderman v. United States, 394 U.S. 165, 181, 183 (1969); United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962). This it never did.**

The district court's statement that there were other independent sources for the information (A.62) does not meet the issue. The court was concerned only with the sources of Walsh's information about the Robbins loans and treated the

---

* An SLA memo mentions a "confidential" informant as a source of information that Sacco violated his parole conditions. In fact, the District Attorney learned about this through the wiretaps. P. 1465-66; 1478, Florida hearings.

** Gentile did not know about the Westchester wiretaps at the trial and therefore did not question Estler and Goetz about whether the taps were the impetus of the Dooley investigation. Neither side recalled the Agents at the taint hearing but Goetz' testimony at the Florida hearing was part of the record.

The Government turned over to the Court below certain memoranda which were sealed and not shown to defendant's counsel. We have, therefore, no knowledge of what those reflect.

factual issues only in that context. The court's statement about the absence of evidence "to indicate that any information in the S.L.A. files came from the illegal wiretaps" was clearly wrong because, as we have shown, there was such evidence. Similarly, Walsh, when investigating the Robbins loans in 1972, may have learned about the Dooley's opening from federal agents (A.62). That would not bear, however, on the source of the Estler and Goetz investigation in April, 1970.

In short, the district court should have insisted on a satisfactory showing by the Government as to what exactly put the SLA on the track of Dooley's. As far as we know, no such showing was made.*

CONCLUSION

Because of the Government's failure to meet the taint issue, the indictment should be dismissed. Barring that, there should be a further taint hearing at which the Government must show the impetus for the Dooley's investigation; and, in addition, a new trial for Gentile severed from Sacco.**

---

* If we are right about the connection between the wiretaps and the Dooley's investigation, the taint would effect not only the Estler and Goetz proof but the testimony of Kitty Fabian about Sacco and Gentile's purchase of and activity in the bar, the $500 check which reflected the first loan to Robbins, which Walsh obtained from the SLA, and the testimony of Anthony Iodice corroborating Robbins' testimony about the original $500 loan (389-93).

** We rely in addition on any points of co-appellant to the extent applicable.

Respectfully submitted,

HOWARD L. JACOBS, P.C.
Attorney for Appellant
Benjamin Gentile
401 Broadway
New York, New York 10013

HOWARD L. JACOBS
DONALD E. NAWI
Of Counsel

Copy received
3/15/77
Audrey Atkins
AUSA